WC 05-276

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September 21, 2005

ERRATA

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, S.W.
Washington, D.C. 20554

Re: SBC ILECs' September 19, 2005, Petition for Declaratory Ruling

Dear Ms. Dortch:

On September 19, 2005, the SBC ILECs filed a petition for a declaratory ruling to implement the recent primary jurisdiction referral order issued by the United States District Court for the Eastern District of Missouri.[1] The SBC ILECs now make this errata filing to correct certain mistakes in the petition as filed. We are enclosing the original and five copies of the corrected version of the filing. Please use these to replace the original and four copies of the filing provided on September 19, and please date-stamp and return the additional copy in the enclosed envelope.

Thank you for your attention to this matter. If you have any questions, please do not hesitate to contact me at (202) 326-7968.

Yours truly,

Colin S. Stretch

cc (w/ encl.):
Counsel of Record in No. 4:04-CV-1303 (CEJ) (E.D. Mo.)

[1] *See* Memorandum and Order, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ) (E.D. Mo. Aug. 23, 2005).

CORRECTED VERSION

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

RECEIVED

SEP 21 2005

Federal Communications Commission
Office of Secretary

In the Matter of Petition for Declaratory Ruling That UniPoint Enhanced Services, Inc. d/b/a PointOne and Other Wholesale Transmission Providers Are Liable for Access Charges	WC Docket No. 05-276

PETITION OF THE SBC ILECS FOR A DECLARATORY RULING

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September 19, 2005

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INTRODUCTION AND SUMMARY

In April 2004, this Commission put to rest a heated controversy over the proper compensation applicable to so-called "IP-in-the-middle" long distance calls – *i.e.*, ordinary long distance calls that are transported using the Internet Protocol ("IP"). In a highly publicized decision, the Commission ruled that IP-in-the-middle long distance calls – whether transported by a single provider or by multiple providers – are "telecommunications services" subject to access charges. *See* Order, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, 19 FCC Rcd 7457 (2004) ("*AT&T Order*"). While some IP-in-the-middle providers accepted the Commission's decision and conformed their behavior accordingly, Unipoint Enhanced Services, Inc. d/b/a PointOne ("PointOne") and other similar providers have chosen to flout the Commission's decision and, to this day, are still refusing to pay access charges on the ordinary long distance calls they transport using IP-in-the-middle technology.

The incumbent local exchange carriers affiliated with SBC Communications Inc. (the "SBC ILECs")[1] conservatively estimate that these IP-in-the-middle providers have evaded more than $100 million in SBC ILEC access charges over the last five years, and that amount is growing by more than $1 million per month. It is also quite likely that these same providers are similarly depriving many other local exchange carriers of the access charges they are owed on IP-in-the-middle long distance calls.

[1] The SBC ILECs include Southwestern Bell Telephone, L.P., Pacific Bell Telephone Company, The Southern New England Telephone Company, Illinois Bell Telephone Company, Indiana Bell Telephone Company Incorporated, Michigan Bell Telephone Company, The Ohio Bell Telephone Company, Wisconsin Bell, Inc., Nevada Bell Telephone Company, and The Woodbury Telephone Company.

To make matters worse, these IP-in-the-middle providers have now been emboldened in their defiance of this Commission's ruling by a recent federal district court decision that professed uncertainty over whether and how the *AT&T Order* applies to them.[2] In response to litigation initiated by the SBC ILECs to require certain IP-in-the-middle providers to conform to the *AT&T Order*, PointOne contended, and the district court agreed, that the question of PointOne's liability for access charges on IP-in-the-middle calls was unsettled and should be subject to the primary jurisdiction of this Commission. Emphasizing that access charges apply to "interexchange carriers," *see* 47 C.F.R. § 69.5(b), the court concluded that, to resolve the SBC ILECs' complaint, it would have to determine that PointOne is an interexchange carrier, which the court believed to be "a technical determination far beyond [its] expertise" and subject to the primary jurisdiction of the Commission. *Order* at 8.

In response to the district court's primary jurisdiction referral and pursuant to 47 C.F.R. § 1.2, the SBC ILECs file this petition for a declaratory ruling to prevent PointOne and other similarly situated providers from making a mockery of the *AT&T Order*.

I. To remove any purported uncertainty over the applicability of the *AT&T Order*, the Commission should make clear that, when wholesale transmission providers use IP to carry ordinary long distance calls that originate and terminate on the public switched telephone network ("PSTN"), they are acting as "interexchange carriers" for purposes of Rule 69.5 and are accordingly subject to access charges.

A. The text of the Commission's rules requires that result. For purposes of switched access charges, section 69.5(b) states that access charges shall be assessed on "interexchange

[2] *See* Memorandum and Order, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303 (CEJ) (E.D. Mo. Aug. 23, 2005) ("*Order*") (Ex. A).

carriers." 47 C.F.R. § 69.5(b).[3] The Commission's rules define "interexchange" in relevant part as "services or facilities provided as an integral part of interstate or foreign telecommunications," *id.* § 69.2(s), and the term "carrier" plainly refers simply to an entity carrying a call from one point to another. Thus, when a transmission provider provides carriage as "an integral part" of a long distance call, it is liable for access charges under Rule 69.5(b). It makes no difference whether the transmission provider is acting as a retail provider or a wholesale provider. Indeed, the Commission's rules do not distinguish between "wholesale" and "retail" providers, and wholesale transmission providers, no less than retail long distance carriers, provide carriage as "an integral part" of a long distance call. Accordingly, any suggestion that wholesale transmission providers are exempt from access charges is entirely without merit.

That result is confirmed by industry practice. When PointOne or any other carrier provides wholesale transmission using IP-in-the-middle to another carrier, it stands in the same shoes as the many carriers that provide wholesale transmission over conventional facilities and deliver calls to local exchange carriers (including the SBC ILECs) for termination. Those conventional wholesale providers routinely pay access charges pursuant to Rule 69.5(b) for their "use [of] local exchange switching facilities," and there is no basis in law or policy to excuse PointOne or any other carrier providing the same functionality from those same charges, simply because their transmission networks employ IP.

Any other result would violate the filed rate doctrine. As the Supreme Court has explained, "the policy of nondiscriminatory rates" at the heart of that doctrine "is violated when similarly situated customers pay different rates for the same services." *AT&T Co. v. Central*

[3] In fact, carrier's carrier charges are assessed on entities that are not interexchange carriers, notwithstanding Rule 69.5(b); however, the Commission need not decide this petition on that basis since PointOne and similarly situated carriers clearly are interexchange carriers.

Office Tel., Inc., 524 U.S. 214, 223 (1998). Yet that is precisely the result advocated by IP-based transmission providers such as PointOne, which insist that they are exempt from access charges, even as other wholesale transmission providers dutifully pay those same charges.

B. PointOne has insisted that, because it is supposedly not a "common carrier," it cannot be considered an "interexchange carrier" for purposes of the access charge rules. But the truth of the matter is that PointOne and similar carriers *are* common carriers. Commission precedent makes clear that wholesale transmission providers qualify as common carriers, provided they offer service to all comers. That is plainly the case here. PointOne, for example, has touted the fact that it provides "any-to-any" transmission services to virtually anyone, by which it means that it "transmits and routes traffic between *any* origination and termination device . . . *without discriminating* based on the form or capability of the device."[4] Particularly when coupled with PointOne's recent announcement of its "new effective per minute rate" for various transmission services that is "effective across the entire PointOne customer base,"[5] PointOne's nondiscriminatory service qualifies as common carriage.

In any case, nothing in the Commission's rules suggests that the term "interexchange carrier" in Rule 69.5(b) is confined to common carriers and does not include private carriers. The Commission has long recognized that the applicability of access charges does not depend on whether a party is a common carrier. Rather, private carriers, just like common carriers, are subject to access charges under Rule 69.5(b) when carrying interexchange traffic. Any other reading would not only be contrary to Commission precedent, but also would lead to the absurd

[4] Letter from Staci L. Pies, Vice President, Government and Regulatory Affairs, PointOne, to William A. Haas, Associate General Counsel, McLeod USA, at 4 (Feb. 1, 2005) ("Pies Letter") (Ex. B) (emphases added).

[5] PointOne Notification of Rate Adjustment to Metered VPN Services and Variable Rate Private Line (VRPL) (Aug. 16, 2005) ("PointOne Rate Notice") (Ex. C).

result of creating an enormous loophole for a distinct class of users of access facilities – *i.e.*, private carriers – that are neither "end users" nor "interexchange carriers" and would thus be unaccounted for in the Commission's access charge regime.

II. The Commission must act expeditiously to resolve this petition. In the past five years, IP-in-the-middle carriers have evaded hundreds of millions of dollars in access charges. As noted at the outset, SBC conservatively estimates that, all told, wholesale IP-in-the-middle carriers have already evaded at least $100 million in SBC ILEC access charges, and that number is growing by more than $1 million per month. Once other LECs are factored in, that number is undoubtedly many times higher. The supposed uncertainty identified in the district court's ruling, moreover, will likely cause these IP-in-the-middle carriers to redouble their efforts to evade access charges on an increasing amount of interexchange traffic, thus perpetuating precisely the problems – in terms of undermining competition among long-haul providers, preventing ILECs from "receiv[ing] appropriate compensation for the use of their networks," and interfering with "important Commission rules, such as the obligation to contribute to the universal service support mechanisms," *AT&T Order* ¶ 2 – that caused the Commission to take action against IP-in-the-middle providers in the first place. The Commission should act without delay to prevent that result.

BACKGROUND

A. The Use of IP-in-the-Middle To Evade Access Charges

As the Commission has stressed, the ability to transmit voice using IP promises "new and innovative services" to end users and thereby "promote[s] competition" for local exchange

service. *Vonage Order*[6] ¶ 20. This petition, however, is not about the use of IP to revolutionize local competition. Rather, just as in the *AT&T Order*, this petition involves the use of IP solely in the middle of a conventional, PSTN-to-PSTN interexchange call, to transport that call from one place to another.

Carriers use many different technologies and transmission media to transmit long distance calls. Some carriers use microwave transmission, others use fiber optics, others use satellites, and still others use the copper wires that have been in use for decades. Under long-standing Commission rules, however, the choice of transmission technology makes no difference to the regulatory classification of a conventional long distance telephone call or the applicability of access charges. So long as a long distance call begins and ends as an ordinary telephone call on the PSTN, it is subject to access charges, regardless of the technology that a carrier uses to transmit that call. *See, e.g., AT&T Order* ¶ 17; Report to Congress, *Federal-State Joint Board on Universal Service,* 13 FCC Rcd 11501, ¶ 59 (1998).

Nevertheless, in the last decade (and increasingly beginning around 2000), carriers that had implemented IP in their networks began to take the position that PSTN-to-PSTN calls transported using IP were exempt from access charges. As support for this improbable claim, these carriers have relied on the Commission's so-called "ESP Exemption." In the wake of the break-up of the Bell system, the Commission put in place an access charge regime to ensure that "local carriers recover the cost of providing access services needed to complete interstate and foreign telecommunications." Memorandum Opinion and Order, *MTS and WATS Market Structure*, 97 F.C.C.2d 682, ¶ 2 (1983) ("*MTS/WATS Order*"). For purposes of this regime, the

[6] Memorandum Opinion and Order, *Vonage Holdings Corp. Petition for Declaratory Ruling Concerning an Order of the Minnesota Public Utilities Commission*, 19 FCC Rcd 22404 (2004) ("*Vonage Order*").

Commission divided users of local exchange facilities into, broadly speaking, two categories: (1) non-carrier "customer[s]" of an "interstate or foreign telecommunications service," termed "end users," 47 C.F.R. §§ 69.2(m), 69.5(a); and (2) "interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services," *id.* § 69.5(b); *see also id.* § 69.2(s) ("*Interexchange* or the *interexchange category* includes services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as 'access service' for purposes of this part.").

The Commission recognized that enhanced services providers "employ exchange service for jurisdictionally interstate communications" and are thus presumptively subject to "full carrier usage charges." *MTS/WATS Order* ¶ 83. At the same time, the Commission expressed concern that the application of those charges would create "rate shock," and it accordingly created an exemption from the "carrier's carrier" access charges that would otherwise apply. *Id.* That is to say, notwithstanding the fact that enhanced services providers "use incumbent LEC facilities to originate and terminate interstate calls," the Commission classified those providers as end users for purposes of Rule 69.5 and permitted them to "purchase services from incumbent LECs under the same intrastate tariffs available to end users." First Report and Order, *Access Charge Reform*, 12 FCC Rcd 15982, ¶¶ 341-342 (1997) ("*Access Charge Reform Order*"), *aff'd*, *Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523 (D.C. Cir. 1998); *see MTS/WATS Order* ¶ 83.

To take advantage of the ESP Exemption, transport providers using IP technology took the position that *any* ordinary long distance call transmitted in IP was thereby transformed into an "enhanced" service exempt from access charges. From the beginning, this claim was a transparent abuse of the Commission's rules. The Commission has explained that the ESP Exemption does *not* apply where a service provider "uses the LEC facilities as an element in an

end-to-end long distance call,"[7] and it was on that basis that the Eighth Circuit upheld the exemption against a discrimination claim. *See Southwestern Bell Tel. Co. v. FCC*, 153 F.3d 523, 542 (8th Cir. 1998) (holding that the ESP Exemption "do[es] not discriminate in favor of [enhanced services providers], which do not utilize [local exchange carrier] services and facilities in the same way or for the same purposes as other customers who are assessed per-minute interstate access charges"). It is clear, however, that, where a provider uses IP to transport a PSTN-to-PSTN interexchange call, it "utilize[s]" local exchange switching facilities in *precisely* "the same way [and] for the same purposes" as carriers "who are assessed per-minute interstate access charges." *Id.*

Take, for example, a traditional long distance carrier such as AT&T or MCI. In the ordinary course, a PSTN-to-PSTN call will originate and terminate on an ILEC network, with the long distance carrier transporting the call in between. As the Commission recognized in the *AT&T Order*, where the long distance carrier uses IP in its long-haul network, the call still originates and terminates on an ILEC network, and it uses ILEC switching facilities for termination just like any other ordinary long distance call. As the following diagrams illustrate, the only difference is that, to unlawfully avoid access charges under the guise that the IP-routed call is an "enhanced service," some long distance carriers had been routing these calls through CLECs, which in turn improperly terminated the calls to the ILEC over local interconnection

[7] Brief for Respondents the Federal Communications Commission and the United States at 75-76, *Southwestern Bell Tel. Co. v. FCC*, No. 97-2618 (8th Cir. filed Dec. 16, 1997) ("FCC 8th Cir. Br.").

trunks that are generally not designed to measure and bill for interexchange traffic. *See* Declaration of Robert A. Dignan ¶ 5 ("Dignan Decl.") (Ex. D).[8]

Illustration 1 – Ordinary Long Distance Call:

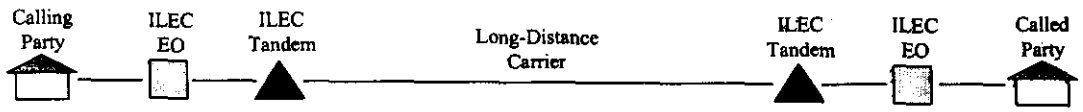
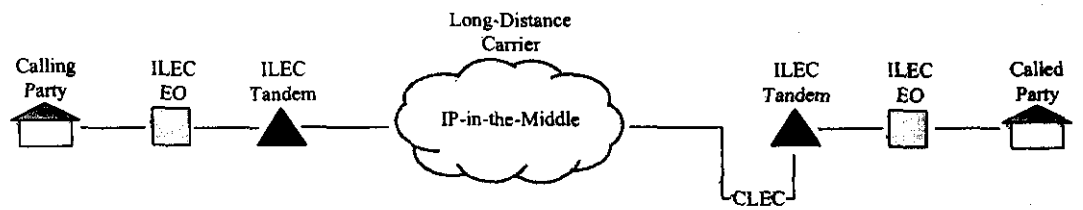


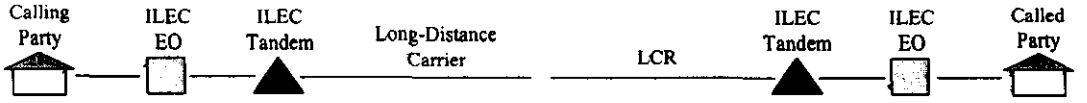
Illustration 2 – IP-in-the-Middle Call:



Critically for purposes of this petition, the same analysis applies for IP-in-the-middle calls routed by wholesale providers. With conventional, non-IP transmission, long distance carriers routinely pass calls to a third-party wholesale transmission provider, depicted below as a "Least Cost Router," or "LCR," which in turn delivers the calls to the ILEC for termination. The use of an LCR makes no difference to the functions the ILEC must perform on the terminating end of the call. Just as with an ordinary call that is carried entirely by a single long distance carrier (*see* Illustrations 1 and 2 above), the ILEC must switch the call and deliver it to the called party. And, just as with any other ordinary call, the carriers that transport the call between exchanges are interexchange carriers liable for access charges. *See* Dignan Decl. ¶ 6.

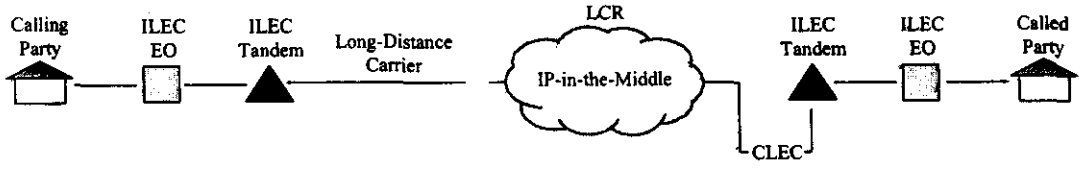
[8] Alternatively, the long distance carrier might attempt to avoid access charges by routing the call directly to the ILEC using primary rate interface lines, or "PRIs," purchased out of intrastate tariffs. *See AT&T Order* ¶ 11 n.49.

Illustration 3 – Conventional Interexchange Call Routed Using Wholesale Provider:



That is equally true, moreover, where the wholesale transmission provider happens to use IP. In that circumstance, the call still originates and terminates on the PSTN, and it still uses ILEC switching facilities for termination just like any other long distance call. As depicted in Illustration 4 below – and just as in Illustration 2, above – the only difference is that, to improperly avoid access charges on the terminating end, the call may be routed through a CLEC, which terminates it to the ILEC over local interconnection trunks.[9]

Illustration 4 – IP-in-the-Middle Call Routed Using Wholesale Provider:



B. The AT&T Petition and the Commission's Declaratory Ruling

In October 2002, in the wake of several criminal prosecutions of companies that evaded access charges,[10] AT&T filed a petition for a declaratory ruling asking the FCC to rule that

[9] Alternatively, as with the scenario described above, the wholesale provider might attempt to avoid access charges by terminating the call directly to the ILEC using a PRI circuit purchased out of an intrastate tariff.

[10] In 2002, the United States Department of Justice ("DOJ") secured guilty pleas from a communications company and two of its officers for "perpetrating a scheme that defrauded [Southwestern Bell Telephone, L.P. ("SWBT")] of millions of dollars in [Switched Access] fees," by "fail[ing] to pay [access charges] for using SWBT's network . . . while providing long distance service." DOJ Press Release, *Long Distance Service Provider NTS Communications,*

PSTN-to-PSTN calls carried using IP-in-the-middle were exempt from access charges.[11] AT&T's theory was that, even though the calls at issue were originated and terminated in exactly the same way as ordinary long distance calls, they were nevertheless exempt from access charges because the use of IP transformed the calls into "enhanced" or "information" services.[12]

Although AT&T itself used IP solely in the middle of its *own* network (as depicted in Illustration 2 above), it was clear from the outset that its petition raised the question of the applicability of access charges to the circumstance in which the IP transmission is provided by a wholesale provider (Illustration 4 above). Indeed, in connection with AT&T's petition, transmission provider PointOne, alone and in conjunction with other providers, submitted 95 pages of advocacy and met with the Commission to press its case on six different occasions.[13] Likewise, transmission provider Transcom Enhanced Services, LLC ("Transcom"), also alone and in conjunction with other providers, submitted 170 pages of advocacy and participated in seven Commission meetings.[14] In these filings and meetings, these carriers echoed AT&T's argument that *any* use of IP to carry ordinary long distance calls turned those calls into "enhanced services" exempt from access charges.[15]

Inc. and Two Executives Are Charged with Defrauding Southwestern Bell Telephone of Millions in Long Distance Usage Fees at 1 (Feb. 28, 2002). *See also* Indictment, *United States v. Ward, et al.*, Nos. IP 01-CR-79-01 *et al.*, ¶ 27 (S.D. Ind. filed July 11, 2001) (alleging conspiracy to commit wire fraud arising out of defendants' efforts to "conceal[] the true nature" of the long distance traffic they delivered to local carriers for termination).

[11] *See* Petition for Declaratory Ruling, *Petition for Declaratory Ruling That AT&T's Phone-to-Phone IP Telephony Services Are Exempt from Access Charges*, WC Docket No. 02-361 (FCC filed Oct. 18, 2002).

[12] *See id.*

[13] *See* Listing of Transcom and PointOne Filings in WC Docket No. 02-361. (Ex. E).

[14] *See id.*

[15] *See, e.g.*, Declaration of Chad Frazier ¶¶ 8-12, WC Docket No. 02-361 (FCC filed Sept. 18, 2003) (arguing that "IP Telephony" results in a "change in content" and qualifies as an

In addition, WilTel specifically asked the Commission to resolve the question presented in AT&T's petition – *i.e.*, whether the use of IP transforms an ordinary PSTN-to-PSTN call into an "enhanced" service exempt from access charges – with respect to various distinct scenarios: (1) where, for example, as in the case of AT&T, "a single interexchange carrier (IXC)" using IP-in-the-middle "carries a call all the way from the originating end-user's local exchange carrier (LEC) to the called end-user's LEC"; and (2) where, as here, "two or more carriers collaborate to perform the same functions" as the single carrier in the first scenario, and "one or more of the carriers . . . (correctly or incorrectly) holds itself out as an 'Enhanced Service Provider'" rather than an interexchange carrier.[16] In describing this latter scenario, WilTel specifically identified PointOne and Transcom as entities claiming to be ESPs and seeking to avoid the payment of access charges on IP-in-the-middle calls.[17]

On April 21, 2004, the Commission denied AT&T's petition and held that the use of IP to transmit ordinary long distance telephone calls does not transform those calls into "enhanced" services exempt from access charges. *See AT&T Order* ¶ 1. Insofar as this petition is concerned, there are four important aspects to the FCC's order.

First, the Commission defined the nature of the services to which its ruling would apply. The Commission held that its decision would apply to any "interexchange" telephone call that: (1) "uses ordinary customer premises equipment (CPE) with no enhanced functionality";

"enhanced service"); *see also id.* ¶ 10 (noting that its argument applies to "all of IP"); Letter from Dana Frix and Kemal Hawa, counsel for Unipoint, to Marlene H. Dortch, FCC, WC Docket Nos. 02-361 *et al.*, Attach. at 2 (FCC filed Jan. 8, 2004) (arguing that "VOIP Providers Are Enhanced Service Providers" and "Should Not Be Burdened With Additional Access Fees . . . . This Approach Will Promote the Continued Growth in VoIP and Advanced IP Networks, and Further Technological Innovation").

[16] Letter from David L. Sieradzki, counsel for WilTel, to Marlene H. Dortch, FCC, WC Docket No. 02-361, Attach. at 1-2 (FCC filed Mar. 12, 2004).

[17] *See id.*, Attach. at 2.

(2) "originates and terminates on the public switched telephone network (PSTN)"; and (3) "undergoes no net protocol conversion and provides no enhanced functionality to end users due to the provider's use of IP technology." *Id.* All long distance calls that meet these criteria, the Commission held, are subject to access charges. *See id.*

Second, with respect to the third criterion noted immediately above – that is, whether the use of IP provides "enhanced functionality to end users" – the Commission emphasized that it was critical to evaluate the service that the *end user* actually received, rather than what the provider claimed to be providing. *See id.* ¶ 12. The Commission concluded that, with respect to the services at issue in AT&T's petition, end users "obtain only voice transmission with no net protocol conversion, rather than information services such as access to stored files." *Id.* In such a situation, "[e]nd-user customers do not order a different service, pay different rates, or place and receive calls any differently than they do through AT&T's traditional circuit-switched long distance service." *Id.* Rather, "[c]ustomers using this service place and receive calls with the same telephones they use for all other circuit-switched calls," and "[t]he initiating caller dials 1 plus the called party's number, just as in any other circuit-switched long distance call." *Id.* ¶ 11.

Third, the Commission made clear that its analysis applied not only to AT&T, but also where, as here, "multiple service providers are involved in providing IP transport." *Id.* ¶ 19; *see id.* ¶ 1. Specifically citing the WilTel ex parte noted above, the Commission explained that "*all* telecommunications services are subject to our existing rules," and it thus held that, "when a provider of IP-enabled voice services contracts with an interexchange carrier to deliver interexchange calls that begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN, the interexchange carrier is obligated to pay terminating access charges." *Id.* ¶ 19 (emphasis added). The Commission observed that this approach was necessary to ensure that

AT&T was not "place[d] . . . at a competitive disadvantage" and to "remedy the current situation in which some carriers may be paying access charges for these services while others are not." *Id.*

Fourth, the Commission explained that it does not "act as a collection agent for carriers with respect to unpaid tariffed charges," and it accordingly directed local exchange carriers, such as the SBC ILECs, that had been deprived of access charges to "file any claims for recovery of unpaid access charges in state or federal courts, as appropriate." *Id.* ¶ 23 n.93.

C. PointOne's and Others' Defiance of the Commission's Order, the Ensuing Litigation, and the District Court's Referral Order

No party appealed the *AT&T Order*, and, in the wake of it, some long distance carriers (including AT&T) represented that they would immediately begin to pay access charges on all ordinary long distance calls consistent with the Commission's ruling. Other carriers – including, among others, VarTec, PointOne, and Transcom – refused to take that step. Despite their extensive efforts to convince the Commission to rule that the use of IP transforms PSTN-to-PSTN calls to enhanced services *before* the Commission ruled, in the wake of that ruling, these carriers took the position that the order had nothing to do with them, and they continued to operate precisely as before. Indeed, even today, 18 months after the Commission's ruling, PointOne, Transcom, and similarly situated carriers continue to evade more than $1 million per month in SBC ILEC access charges on IP-in-the-middle calls. *See* Dignan Decl. ¶ 9.

In light of this stark defiance of the Commission's ruling, in the fall of 2004, the SBC ILECs initiated a lawsuit against various providers in the United States District Court for the Eastern District of Missouri alleging breach of federal and state tariffs and other claims, and

seeking money damages and permanent injunctive relief for interexchange traffic delivered to the SBC ILECs without payment of access charges and in violation of the *AT&T Order*.[18]

The defendants' primary reaction was to point fingers at one another. Just prior to the filing of the SBC ILECs' lawsuit, VarTec – a retail long distance provider that has since filed for bankruptcy under Chapter 11 – filed a petition for a declaratory ruling with the Commission contending that, when it contracted with IP-based carriers to carry its long distance traffic, the IP-based carriers, not VarTec itself, are responsible for access charges.[19] For their part, PointOne and Transcom claimed that, under Rule 69.5, only self-styled "interexchange carriers" such as VarTec could be held liable for access charges, not carriers that hold themselves out as "enhanced services providers."[20] In addition, PointOne contended that the question of whether an entity that defines itself as an "enhanced services provider" could be liable for access charges was subject to the primary jurisdiction of the Commission.[21]

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[18] *See* First Amended Complaint, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303CEJ (E.D. Mo. filed Dec. 17, 2004) (Ex. F).

[19] Petition for Declaratory Ruling, *Petition for Declaratory Ruling That VarTec Telecom, Inc. Is Not Required to Pay Access Charges* (FCC filed Aug. 20, 2004).

[20] *See* UniPoint Memorandum in Support of Motion To Dismiss for Failure To State a Claim or in Deference to Primary Jurisdiction of the Federal Communications Commission at 11-12, *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, No. 4:04-CV-1303CEJ (E.D. Mo. filed Jan. 21, 2005) ("PointOne Motion to Dismiss Mem."); Memorandum Brief in Support of the Motion to Dismiss of Transcom Enhanced Services, LLC, and Transcom Holdings, Inc., *Southwestern Bell Tel., L.P. v. VarTec Telecom, Inc.*, Case No. 4:04-cv-01303-CEJ (E.D. Mo. filed Jan. 21, 2005). PointOne has subsequently pursued this theory still further, with a motion in VarTec's Chapter 11 bankruptcy proceeding requesting indemnification in the event access charges are assessed on interexchange traffic carried by VarTec and handed off to PointOne. *See* Unipoint Holdings, Inc.'s Motion To Modify the December 2, 2004 Adequate Protection Stipulation and Consent Order or, Alternatively, to Compel Assumption/Rejection of Executory Contract, Chapter 11 Case No. 04-81694-SAF-11 (Bankr. N.D. Tex. filed Aug. 17, 2005) ("PointOne Motion to Compel") (Ex. G).

[21] *See* PointOne Motion to Dismiss Mem. at 16-23. After filing its motion in district court in Missouri, Transcom took "the unusual step of declaring bankruptcy specifically to get a bankruptcy court judge to rule on the enhanced services exemption from access fees." Carol

On August 23, 2005, the district court issued its *Order* referring PointOne's latter contention to the Commission. The court first recited the SBC ILECs' core allegation – that "defendants improperly deliver" long distance calls routed using IP over local interconnection facilities "that lack the capacity to detect and measure long distance calls" – and their contention that, under the *AT&T Order*, the defendants in the case are liable for the access charges that they avoid through this practice. *Order* at 2-3 (citing *AT&T Order* ¶ 11). The court also noted, however, the Commission's rules distinguishing between "providers of 'telecommunications services,'" on one hand, and providers of "'enhanced' or 'information services,'" on the other hand, as well as the Commission's policy of "exempt[ing]" enhanced services providers "from tariffs governing access charges." *Id.* at 3. Although observing that "[t]he introduction of IP telephony . . . blurs the distinction between telecommunication and enhanced services," the court stressed that the *AT&T Order* had ruled that "all interexchange carriers providing IP telephony are required to pay access charges for calls that 'begin on the PSTN, undergo no net protocol conversion, and terminate on the PSTN,'" and it further acknowledged that "[t]his rule applies whether the interexchange carrier provides its own IP voice services or contracts with another provider to do so." *Id.* at 4-5 (quoting *AT&T Order* ¶ 18).

For the court, the difficult issue was whether PointOne could be considered an "interexchange carrier" and therefore liable for access charges under Rule 69.5. The court

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Wilson, *Competitors Fight Among Duopoly Fear*, Telephony Online (Mar. 28, 2005), *at* http://telephonyonline.com/mag/telecom_competitors_fight_amid/index.html. Accordingly, pursuant to 11 U.S.C. § 362(a), the SBC ILECs' claims are stayed as against Transcom (though not as against Transcom Holdings, Inc. or Transcom Communications, Inc., *see Order* at 9 & n.10). The bankruptcy court overseeing Transcom's Chapter 11 proceeding subsequently ruled that Transcom's use of IP transforms ordinary long distance calls into enhanced services exempt from access charges. *See In re Transcom Enhanced Services, LLC*, No. 05-31929-HDH-11 (Bankr. N.D. Tex. Apr. 28, 2005). That ruling, which is now on appeal to federal district court for the Northern District of Texas, is in direct conflict with the *AT&T Order*.

acknowledged that, under paragraph 19 of the *AT&T Order*, the SBC ILECs had plainly stated a claim as against VarTec. *See id.* at 6. But the court was less certain as to PointOne. "[I]n order to determine whether [PointOne is] obligated to pay the tariffs in the first instance," the court explained, "the Court would have to determine either that" PointOne is an "[interexchange carrier] or that access charges may be assessed against entities other than [interexchange carriers]." *Id.* at 8. The court was not comfortable making either determination: "The first is a technical determination far beyond the Court's expertise; the second is a policy determination currently under review by the FCC." *Id.* The court accordingly referred the matter to the Commission, recognizing that the Commission "may determine that" wholesale providers such as PointOne "are interexchange carriers in the transmission of IP telephony," in which case the SBC ILECs would be permitted to pursue their claims. *Id.* at 7.[22]

DISCUSSION

I. THE COMMISSION SHOULD DECLARE THAT WHOLESALE TRANSMISSION PROVIDERS USING IP TECHNOLOGY TO TRANSPORT ORDINARY LONG DISTANCE CALLS ARE LIABLE FOR ACCESS CHARGES UNDER RULE 69.5 AND APPLICABLE TARIFFS

A. Wholesale Transmission Providers That Happen To Use IP Technology Are Still "Interexchange Carriers" for Purposes of Rule 69.5

The core question posed by the district court's referral order is a discrete one: whether a wholesale transmission provider using IP technology to carry an ordinary long distance call that originates and terminates on the PSTN, as depicted in Illustration 4 above, is liable for access

[22] Following its determination to refer the matter to the Commission, the court dismissed the SBC ILECs' claims without prejudice. *See Order* at 8. On September 2, 2005, the SBC ILECs filed a motion to amend the judgment asking the court to stay their claims, rather than dismiss them, pending referral to the Commission, and also asking the court to set a time limit by which the Commission must act. That motion does not ask the court to reconsider the underlying decision to refer the matter to the Commission, and it accordingly should not interfere with the Commission's prompt resolution of this matter. The SBC ILECs will promptly inform the Commission in the event the court revises its judgment.

charges under Rule 69.5 and applicable tariffs. Although PointOne has claimed that it can *never* be held liable for access charges in *any* circumstances – because, as a general matter, it considers itself to be an "enhanced" or "information" service providers[23] – the law is clear that the classification of a provider turns not on how the provider classifies *itself* or the classification of its predominant line of business, but rather "on the particular practice under surveillance." *Southwestern Bell Tel. Co. v. FCC*, 19 F.3d 1475, 1481 (D.C. Cir. 1994). It is equally clear that, when PointOne or any other similarly situated carrier engages in long-haul transmission of ordinary long distance calls that begin and end on the PSTN, it is functioning as an "interexchange carrier" for purposes of Rule 69.5 and is accordingly liable for the applicable tariffed access charges.

1. This result is commanded, first, by the text of the Commission's regulations. As noted above, for purposes of switched access charges, the Commission's rules reference "end users," which are subject to "end user" charges, and "interexchange carriers," which are subject to "carrier's carrier" access charges:

> (a) End user charges shall be computed and assessed upon public end users, and upon providers of public telephones, as defined in this subpart, and as provided in subpart B of this part.
>
> (b) Carrier's carrier [*i.e.*, access] charges shall be computed and assessed upon all interexchange carriers that use local exchange switching facilities for the provision of interstate or foreign telecommunications services.

47 C.F.R. § 69.5.[24]

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[23] *See, e.g.*, PointOne Motion to Dismiss Mem. at 11-12; *see also* Consolidated Brief of Appellee Transcom Enhanced Services, LLC at 44, 46, *AT&T Corp. v. Transcom Enhanced Servs., LLC*, No. 3:05-CV-1209-B (N.D. Tex. filed Aug. 8, 2005) ("Transcom App. Br.").

[24] The Commission has recognized that where entities other than interexchange carriers use the same access services that interexchange carriers do, they accordingly purchase access services out of the local exchange carrier's 69.5(b) tariffs, and are obligated to pay the associated charges. *See, e.g.*, First Report and Order, *Implementation of the Local Competition Provisions*

When providing IP-based transmission on PSTN-to-PSTN calls, wholesale transmission providers such as PointOne are "interexchange carriers," not "end users." Simply put, these providers offer long-haul "carriage" of "interexchange" calls; they therefore qualify as "interexchange carriers" under any reasonable conception of the term.

Moreover, the Commission's rules define "interexchange" as "services or facilities provided as an integral part of interstate or foreign telecommunications that is not described as 'access service' for purposes of this part." *Id.* § 69.2(s). Where they cross state lines, PSTN-to-PSTN interexchange calls plainly qualify as "interstate or foreign telecommunications," and the "service" these providers offer – carriage of the call from one point to another – is equally plainly an "integral part" of those calls. In addition, that service is *not* an "[a]ccess service," which the Commission's rules define as "services and facilities provided for the *origination or termination* of any interstate or foreign telecommunication," *id.* § 69.2(b) (emphasis added), and which, in the circumstances at issue in this petition, is performed by local exchange carriers. And, because the "integral part" of the service provided by wholesale providers is the *carriage* of the call from one point to another, these providers are properly considered interexchange "carriers" for purposes of Rule 69.5.

These providers are also properly considered interexchange carriers "that use local exchange switching facilities for the provision of interstate or foreign telecommunications services." *Id.* § 69.5(b). As noted at the outset, the PSTN-to-PSTN calls that PointOne and other similarly situated providers carry originate and terminate on the PSTN, involve no net protocol conversion, and provide no enhanced functionality to end users as a result of the use of IP.

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of the Telecommunications Act of 1996, 11 FCC Rcd 15499, ¶ 873 (1996). Indeed, LECs *must* permit non-carrier customers to purchase access services out of the rule 69.5(b) tariffs, since any other rule would constitute an impermissible use restriction. *See* Memorandum Opinion and Order, *Filing and Review of Open Architecture Plans*, 4 FCC Rcd 1, ¶¶ 321-324 (1998).

Under the *AT&T Order*, it follows that these calls are "telecommunications services" for purposes of Rule 69.5(b). *See AT&T Order* ¶¶ 12, 14, 19. Furthermore, by routing the call through a CLEC to the incumbent LEC for termination to the called party, these providers "use local exchange switching facilities for the provision of interstate or foreign telecommunications services" in precisely the same way that AT&T did when providing the IP-in-the-middle service at issue in the *AT&T Order*. *See id.* ¶ 11 n.49 (noting that in many cases where the called party was served by an ILEC, AT&T "purchases PRIs from a competitive LEC," which in turn "terminates the call over reciprocal compensation trunks"). If, as the Commission held, AT&T was liable for access charges when it engaged in this routing, it follows that wholesale transmission providers such as PointOne are liable as well.

This result is confirmed by the fact that wholesale transmission providers are not "end users" for purposes of Rule 69.5. The Commission's rules define "end user" as

> any customer of an interstate or foreign telecommunications service that is not a carrier except that a carrier other than a telephone company shall be deemed to be an "end user" when such carrier uses a telecommunications service for administrative purposes and a person or entity that offers telecommunications services exclusively as a reseller shall be deemed to be an "end user" if all resale transmissions offered by such reseller originate on the premises of such reseller.

47 C.F.R. § 69.2(m). When providing IP-based transmission of PSTN-to-PSTN calls, wholesale transmission providers are not "customers" of an "interstate or foreign telecommunications service"; rather, they are providing an integral part of such a service. Likewise, such providers are not in these circumstances using "telecommunications service for administrative purposes," nor are they operating "exclusively as a reseller" (much less one whose "resale transmissions . . . originate" on its own premises). The fact that wholesale transmission providers do not qualify as "end users" for purposes of Rule 69.5 confirms that, when these providers "use local exchange

switching facilities for the provision of interstate or foreign telecommunications services," they are "interexchange carriers" subject to access charges.

2. Industry practice confirms that wholesale transmission providers using IP technology are "interexchange carriers" and therefore subject to access charges under Rule 69.5 when transporting interexchange traffic between points of origination and termination on the PSTN. As noted above, retail providers of interexchange telephone service routinely rely upon wholesale providers of long distance transmission in order to terminate interexchange calls. Where they do so – and where the wholesale provider uses non-IP technology and does not misroute the call through a CLEC – access charges are routinely assessed on *the wholesale provider*. *See* Dignan Decl. ¶ 6.

That same result applies here. Where a provider such as PointOne provides wholesale transmission of an ordinary PSTN-to-PSTN call, it stands in the same shoes as any other carrier that performs the same task, and it accordingly must be treated the same as those other carriers. The only differences between the conventional use of wholesale transmission providers and the facts at issue in this petition are: (1) here, the wholesale provider uses IP transmission, and (2) here, the wholesale provider attempts to avoid the ILEC's tariff by routing the call through a CLEC, which in turn delivers the call to the ILEC over local interconnection trunks. Yet both of these differences were present in the *AT&T Order*, and the Commission squarely concluded that, even so, access charges apply. *See AT&T Order* ¶ 11 & n.49 (explaining AT&T's use of IP to transmit interexchange calls and its routing of those calls through CLECs); *id.* ¶¶ 12, 14, 19 (holding that calls routed using IP and terminated via CLECs are "telecommunications services" subject to access charges, even where "multiple service providers are involved in providing IP transport"). The Commission should do the same here.

Indeed, the providers themselves have anticipated (and contracted for) the likelihood that they would be assessed access charges. Thus, for example, PointOne has in the past received a substantial amount of traffic from VarTec, a retail long distance carrier, and PointOne itself has characterized its contract with VarTec as "requir[ing] that [PointOne] be indemnified for" any access charges that are determined to apply to the traffic that PointOne carries on VarTec's behalf.[25] Likewise, where the wholesale transmission provider contracts with a CLEC to hand-off calls to the ILEC for termination to the called party, the contract routinely provides that any access charges assessed on the CLEC will be passed through to the wholesale provider.[26] The parties themselves thus recognize that the Commission's regulations mean what they say, and that carriers such as PointOne are potentially liable for carrier's carrier access charges in accordance with the plain terms of Rule 69.5(b).

3. Finally, the classification of PointOne and similarly situated providers as "interexchange carriers" for purposes of Rule 69.5 is necessary to comply with the filed rate doctrine.

Like all federal tariffs, the SBC ILECs' filed access tariffs are the "equivalent of a federal regulation." *Cahnmann v. Sprint Corp.*, 133 F.3d 484, 488 (7th Cir. 1998) (Posner, J.); *see, e.g.*, *Marcus v. AT&T Corp.*, 138 F.3d 46, 55 (2d Cir. 1998). Under "the century-old 'filed-rate doctrine,'" *Central Office Tel.*, 524 U.S. at 222, those tariffs accordingly establish "the only lawful charge" for the call termination services they cover, and "[d]eviation from [them] is not

[25] PointOne Motion to Compel at 9, ¶ 17.

[26] *See* Master Services Agreement Between AT&T Corp. and Transcom Enhanced Services, LLC, Addendum at 1 ("In the event . . . AT&T notifies [Transcom] of an [ILEC] billing AT&T access charges on the VoIP Services, [Transcom] may terminate the circuits . . . to which such access charges apply . . . by written notice . . . . If AT&T does not receive notice as provided in this paragraph, [Transcom] shall pay all access charges . . . .") (Ex. H); *see also* Master Services Agreement Between McCleodUSA and Unipoint Services, Inc., Addendum No. 1, at 2 (Ex. I).